Supreme Court, U.S.
FILED

No. 00-880 NOV - 7 2000

In the

OFFICE OF

Supreme Court of the United States

VERNICESA F. BARNES,

Petitioner,

versus

McDONALD'S CORP.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLARD PROCTOR, JR.
Attorney for Petitioner
1619 S. Broadway
Little Rock, AR 72206
(501) 378-7720

MARINA TRAMONTOZZI
Counsel of Record
c/o CURRY & TAYLOR
Suite 601-S
815 15th Street, N.W.
Washington, D.C. 20005
(202) 393-1070

36 pp

QUESTIONS PRESENTED FOR REVIEW

I THE PETITIONER SUBMITTED SUFFICIENT EVIDENCE TO OVERCOME THE STANDARD FOR A MOTION FOR SUMMARY JUDGMENT BY SUBMITTING SUFFICIENT DIRECT EVIDENCE TO OVERCOME A DISMISSAL ON THE ISSUES OF A BREACH OF CONTRACT CLAIM AND VIOLATATION OF THE PRIZE PROMOTION STATUTE THEREBY VACATING THE PETITIONER'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

II. THE LOWER COURTS INCORRECTLY INTERPRETED THE UNAMIGUOUS NOTICE PROVISION OF THE ARKANSAS PRIZE PROMOTION STATUTE THEREBY VIOLATING THE PETITIONER'S DUE PROCESS RIGHTS AND CIRCUMVENTING THE LEGISLATIVE INTENT.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL , STATUTORY ORDINANCE PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 17

APPENDIX

CIRCUIT COURT OPINION 1a

DISTRICT COURT OPINION 3a

TABLE OF AUTHORITES

FEDERAL CASES

Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 252, 106 S.Ct. 2505 (1986)..... 9, 11
Chauffeurs, Teamsters and Helpers v. Terry, 110 S.Ct. 1339, 1344-45 (1990)..... 11
City of Monterey v. DelMonte Dunes, 526 U.S. 687, 119 S.Ct. 1624 (1999)..... 10, 11
Conley v. Gibson, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957)..... 9
Dimick v. Schiedt, 293 U.S. 474, 486 (1935)..... 11
Grand Chute v. Winegar, 82 U.S. 373, 375 (1872)..... 11
Jacob v. New York City, 315 U.S. 752, 752-753 (1942)..... 11
Jones v. Smith, 99 F.R.D. 4 (1983)..... 9
Kozlowski v. Ferrarra, 117 F.Supp. 650 (1954)..... 9
Kronmuller v. West End Fire Co. No. 3 Fire Dept., 123 F3rd 170 (1988)..... 9
Markman v. Westview Instruments, Inc., 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995)..... 11
Melo-Sonic Corporation v. Crop, 342 F.2d 856 (3rd Cir. 1965)..... 9
Page v. Work, 290 F.2d 323, 334 (9th Cir. 1961), cert. denied, 368 U.S. 875 (1961)..... 10
Pointer v. American Oil Co., 295 F.Supp.573 (1968)..... 9

STATE CASES

Burford Distributing, Inc. v. Starr, 341 Ark. 914, 20 S.W.3d 363 (2000)..... 14
Nelson v. Timberline Int'l, Inc., 332 Ark. 165, 964 S.W.2d 357 (1998)..... 14
Stockton v. Sentry Ins., 337 Ark. 507, 989 S.W.2d 914 (1999)..... 14

FEDERAL STATUTES

28 U.S.C. Section 1254..... 1

STATE STATUTES

A.C.A. §4-102-106 ..... 12, 13, 14
A.C.A. §4-102-106(b)(5) 13
Ark. Stat. Ann. Section 4-102-106 2

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit dated August 9, 2000, is set forth in the Appendix, p. 1a. (2000 U.S. App. LEXIS 19069). The opinion of the United States District Court for the Eastern District of Arkansas dated September 17, 1999 is set forth in the Appendix, p. 3a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Eighth Circuit issued its Decision in this case on August 9, 2000. This Petition was timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Constitutional Issues

1. **Seventh Amendment of the United States Constitution**

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

2. **Fourteenth Amendment, United States Constitution**

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory issues

Ark. Stat. Ann. Section 4-102-106. Prize Promotion
4-102-106. Disclosures required.

(a) No sponsor shall offer a prize, nor shall a sponsor use any solicitation, whether written or oral, and however communicated, that offers a prize, unless the person to whom such offer is made has first received a written prize notice containing the information required in subsections (b) and (c) of this section.

(b) A written prize notice must contain each of the following:

(1) The true name of the sponsor and the address of the sponsor's actual principal place of business;

(2) The retail value of each prize of each prize the person receiving the notice has been selected to receive or may be eligible to receive;

(3) A statement of the person's odds of receiving each prize identified in the notice;

(4) Any requirement that the person pay shipping or handling fees or any other charges in order to obtain or use a prize, or any fees required to obtain information about a prize, including the nature and amount of such charges;

(5) If the receipt of the prize is subject to a restriction, a statement that a restriction applies, and a description of the restrictions;

(6) Any limitations on eligibility for the prize; and

(7) If a sponsor represents that the person is a "winner", is a "finalist", has been "specially selected", is in "first place", or is otherwise among a limited group of persons with an enhanced likelihood of receiving a prize, the written prize notice must contain a statement of the maximum number of person in the group or purported group with this enhanced likelihood of receiving a prize.

(c) The information required by subsection (b) of this section must be presented in the following form:

(1) The retail value and statement of odds required under subdivisions (b)(2) and (3) of this section must be stated in immediate proximity to each identification of a prize on the written notice, and must be in the same size and boldness of type as the reference to the prize;

(2) The statement of odds must include, for each prize, the total number of prizes to be given away and the total number of written prizes to be distributed;

(3) The number of prizes and written prize notices must be stated in Arabic numbers;

(4) The statement of odds must be in the following for: '. . . (number of prizes) out of . . . (notices distributed)';

(5) If a person is required to pay shipping and handling fees or any other charges in order to obtain a prize, to be eligible to obtain a prize, to obtain information about a prize, or to otherwise participate in the contest, the following statement must appear in immediate proximity to each listing of the prize in the written prize notice, in not less than ten (10) point bold face type: 'YOU MUST PAY $ . . . . TO RECEIVE THIS ITEM' OR 'YOU MUST PAY $ . . . . TO COMPETE FOR THIS ITEM' or 'YOU MUST PAY $ . . . . TO OBTAIN INFORMATION ABOUT THIS ITEM', whichever is applicable; and

(6) A statement required under subdivision (b)(7)of this section must appear in immediate proximity to each representation that the person is among a group of persons with an enhanced likelihood of receiving a prize, and must be in the same size and boldness of type as the representation.

STATEMENT OF THE CASE

Procedural History

On August 13, 1998, Vernicesca F. Barnes, (hereinafter "the Petitioner"), a resident of the Eastern District of Arkansas, filed her complaint against McDonald's Corporation and Nancy Ball D/B/A McDonald's NDK Corporation, (hereinafter referred to as "McDonald"), alleging negligence, breach of contract, and violation of the Arkansas Deceptive Trade Practices Act at the United States District Court of the Eastern District of Arkansas, Western Division on September 16, 1999. The Petitioner sought declaratory judgment, an injunction, compensatory damages, punitive damages, costs and attorneys fees. Along with the complaint, the Petitioner filed Request for Admissions and served Interrogatories and Request for Production of Documents. On September 3, 1998, McDonald's filed a Motion to Dismiss in which the Petitioner filed a response on September 21, 1998. On November 10, 1998, the District Court granted the motion as to one defendant, Nancy Ball d/b/a McDonald's NDK Corporation, and denied it as to McDonald's. On February 17, 1999, the District Court dismissed the Petitioner's claim for negligent infliction of

emotional distress and violation of the Arkansas Deceptive Trade Practices Act. On March 1, 1999, McDonald's filed a Motion for Summary Judgment and the Petitioner filed a response on March 29, 1999. On April 2, 1999, the Petitioner filed a Motion for Leave to File an Amended Complaint. On July 14, 1999, the District Court granted the Petitioner's Motion for Leave to file an Amended Complaint in part by allowing her to add a claim under the Arkansas Prize Promotion Act. It also denied McDonald's Motion for Summary Judgment. On August 10, 1999, McDonald's filed a renewed Motion for Summary Judgment. On September 16, 1999, the District Court granted the motion and entered a judgment dismissing the complaint with prejudice. The Petitioner filed her notice of appeal on October 14, 1999 to the Eighth Circuit Court of Appeals. The District Court's decision was affirmed on August 9, 2000.

The Petitioner has filed a Petition for Certiorari to this Honorable Supreme Court based upon the issues and argument presented herein.

Statement of the Facts

On April 3, 1998, the Petitioner went to McDonald's Restaurant, Store 3539 located on Military Avenue in Benton, Arkansas. On this particular visit, the Petitioner purchased an order of hash browns. At the time of the purchase, McDonald's was promoting sales of their food items by sponsorship of a game known as the Monopoly Game at McDonald's. A game piece was attached to the container holding the Petitioner's hash browns. When she examined the game piece, she found that it stated, "Instant Winner" with the denomination of $200,000.00 shown thereon. This game piece was an Instant Winner--High Level Prize, which entitled the holder of the game piece to a $200,000.00 Better Homes and Gardens Dream Home or a

Cash Prize in the amount of two hundred thousand ($200,000.00) dollars.

That same day, she and workers of McDonald's filled out necessary forms to begin the redemption process. After submission of the redemption forms, the Petitioner was contacted by McDonald's representatives to meet the press regarding the award. However, the McDonald's Redemption Committee denied the claim, alleging that the game piece was miscut and refused to honor the game piece forcing the Petitioner to file a complaint.

During discovery, McDonald's continuously failed to answer interrogatories and other discovery requests. In an Order dated July 14, 1999 the District Court ordered McDonald's to comply, however it failed to do so with no justification. When McDonald's decided to comply, they only answered several of the questions, thereby prejudicing the Petitioner in proving her case with salient facts. However, the District Court ruled that the Petitioner had adequate time for discovery on her breach of contract claim and eventually granted McDonald's Motion for Summary Judgment.

REASONS FOR GRANTING THE WRIT

I THE PETITIONER SUBMITTED SUFFICIENT EVIDENCE TO OVERCOME THE STANDARD FOR A MOTION FOR SUMMARY JUDGMENT BY SUBMITTING SUFFICIENT DIRECT EVIDENCE TO OVERCOME A DISMISSAL ON THE ISSUES OF A BREACH OF CONTRACT CLAIM AND VIOLATATION OF THE PRIZE PROMOTION STATUTE THEREBY VACATING THE PETITIONER'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

If this Court determines that the Petitioner's Writ of Certiorari should be granted, the Court must determine McDonald's liability and an adequate remedy for the Petitioner in situations where there is clear and convincing evidence of the misinterpretation of the notice requirement of a prize promotion statute and a breach of contract claim. Courts should not be able to change the standard of a statute when legislative intent would be disturbed. Moreover, it should be the role of the jury to determine whether the evidence proved the causes of action. The District Court's and Circuit Court's exercise of judicial discretion, in refusing to hear issues dealing with discovery violations, breach of contract claims, and the plain meaning of the state's prize promotion statute, is in direct conflict with Petitioner's right to a trial by jury and due process on these issues. Moreover, the bigger impact is the deception of prize promotions offered by companies. Offers of awards can be easily reneged, even after the offers have been accepted because of loopholes courts create in reading the unambiguous statutes.

Dismissal with prejudice of a party's complaint is a harsh sanction to be resorted to only in extreme cases, and is within the court's sound discretion; court must give full

regard for severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957); *Melo-Sonic Corporation v. Crop*, 342 F.2d 856 (3rd Cir. 1965). A summary judgment motion is appropriate when there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 252, 106 S.Ct. 2505 (1986) A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* A fact is "material" if a dispute over it might affect the outcome of the suit under the governing law. *Id.* No matter how likely it may seem that a pleader will be unable to prove his case, he is entitled, upon averring claim, to opportunity to prove his case, and complaint is not subject to dismissal unless it appears to certainty that Plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations. *Pointer v. American Oil Co.*, 295 F.Supp.573 (1968). Courts may not dismiss complaint for insufficiency unless it clearly appears that by no stretch of the imagination is plaintiff entitled to any relief for claims asserted in his complaint. *Kozlowski v. Ferrarra*, 117 F.Supp. 650 (1954). Even if it is doubtful that plaintiff would ultimately prevail, if plaintiff colorable states facts which, if proven, would entitled him relief, motion to dismiss for failure to state a claim should not be granted. *Kronmuller v. West End Fire Co. No. 3 Fire Dept.*, 123 F3rd 170 (1988).

The Petitioner's case should have never been disposed of upon a summary judgment motion. The lower courts' actions were such an abuse of discretion, because the Petitioner by way of depositions, affidavits and other

competent evidence showed a substantial amount of evidence to prove her claim. The Petitioner's claims have merit since they were plead with particularity. Also, the District Court ordered McDonald to comply with discovery requests; however, they failed to respond to all requests and thus prejudicing the Petitioner to gain access to salient information necessary to substantiate her claims. By granting the motion, the lower courts have undermined the purpose of discovery and awarded McDonald for not responding to the requests.

Since the summary judgment was improperly granted, the Petitioner's constitutional right to a jury trial was violated. *See Page v. Work*, 290 F.2d 323, 334 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961). The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury. Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; however, where the court declines to find a jury right under the statute, the court must reach the constitutional question. *City of Monterey v. DelMonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999). Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least

analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Id*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995). In order to preserve the right to a trial by jury in breach of contract cases and interpretation of statutes, then the Petitioner's case must be heard by a jury.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a ...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.*

This Honorable Court has been highly protective of the jury's role: "Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment...The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor *Anderson, supra*, at 255. It would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence and judge the credibility of witnesses. *Id.* The lower courts granted McDonald's motion based upon an erroneous interpretation of a prize promotion statute. Also, the motion would have been denied if McDonald complied with the discovery

requests and the Petitioner would have had more evidence to substantiate her breach of contract claim under the prize promotion statute. A genuine issue of material fact exists as to the terms of the contract and as to what the Petitioner was actually required to do to fulfill the terms of the contract that existed between the parties under the statute.

This Honorable Court must grant this Petition for Certiorari so that it may clarify the standard for a motion for summary judgment where a constitutional notice violation of a statute does not give an automatic jury trial and the Seventh Amendment is applicable.

II. THE LOWER COURTS INCORRECTLY INTERPRETED THE UNAMIGUOUS NOTICE PROVISION OF THE ARKANSAS PRIZE PROMOTION STATUTE THEREBY VIOLATING THE PETITIONER'S DUE PROCESS RIGHTS AND CIRCUMVENTING THE LEGISLATIVE INTENT.

The central fact is that if there were miscut pieces in McDonald's prize promotion, McDonald had to notify the general public **prior** to the offer. The Arkansas Prize Promotion Statute is clear --the sponsor of a prize must **first** give written notice of any restrictions or limitations on eligibility to the offeree prior to offering the prize. *See* A.C.A. §4-102-106. In our facts, McDonald did not give notice of the restrictions until after the Petitioner was denied her prize. Nothing in the statute or its legislative history authorizes notice in a manner other than that specifically outlined in the statute. The lower courts interpreted the statute unconstitutionally since they created a new standard of notice that puts a potential offeree in a "wait and see" category until the offer is determined to be valid. The District Court stated that McDonald "substantially complied"

with the statute, but that was not enough. The Petitioner complied with all of her obligations under the contract created by receiving a winning ticket. A contractual relationship existed between McDonald and the Petitioner as a participant of the contest since she complied with the contest rules that were posted. It is uncontested that there was no "notice" to the participants that miscut pieces are void.

The Prize Promotion Act is clear: "no sponsor shall offer a prize, nor shall a sponsor use any solicitation, whether written or oral, and however communicated, that offers a prize, unless the person to whom such offer is made has **first received a written prize notice** containing the information required...A.C.A. §4-102-106. This game piece did not contain any rules, regulations, restrictions or conditions; it merely indicated that the Petitioner was the instant winner, thus, possession of the game piece made her a winner. The Circuit Court's and District Court's finding that these rules could be found in newspapers and other publications did not excuse McDonald from complying with A.C.A. §4-102-106(b)(5) which intentionally requires that the written prize notice contain "a description of the restrictions" that apply. The Petitioner's "instant winner" card did not contain these restrictions.

McDonald cannot take refuge in its own mistake to avoid liability. Nor can McDonald attempt to apply terms of an agreement that are beneficial to them that were not a part of the initial agreement. Furthermore, the McDonald should not be allowed to avoid liability because it knew that there were defective game pieces before it started the prize promotion; yet it still conducted the promotion without taking any steps to warn the public about the defective game pieces. McDonald acknowledged that they were aware of 48 individuals who submitted miscut game stamps in the 1998 monopoly game. Since they had notice of defective pieces,

they should have notified the public prior to distributing the game pieces in order to comply with the statute.

The court has repeatedly held that the basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the legislature. In attempting to ascertain legislative intent, the court will look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, legislative history, and other appropriate matters that shed light on the matter. *Burford Distributing, Inc. v. Starr,* 341 Ark. 914, 20 S.W.3d 363 (2000); *Nelson v. Timberline Int'l, Inc.*, 332 Ark. 165, 964 S.W.2d 357 (1998). A statute must be given its plain meaning first. *Starr, supra; Stockton v. Sentry Ins.*, 337 Ark. 507, 989 S.W.2d 914 (1999). A jury must decide whether the act was violated. *Id.*

The Legislative finding, declaration and intent is clear and instructive with respect to A.C.A. §4-102-106:

> (a) The Arkansas General Assembly has become aware of the avalanche of sweepstakes, contests, and prize promotions that have been and are being directed at Arkansas consumers, and recognizes that consumers are often misled by these sweepstakes, contests, and prize promotions. The General Assembly also recognizes that Arkansas consumers have paid hundreds of thousands of dollars to sweepstakes, contests, and prize promoters based upon misrepresentations by those promoters to Arkansas consumers. Many of the sweepstakes, contests, and prize promotions are artfully crafted to lead Arkansas consumers to believe that they have been selected to receive valuable prizes, when such

> is not the case. The promotions often mislead Arkansas consumers as to the value of the prizes. The promotions often mislead Arkansas consumers as to their chances to receive the prize. The promotions often mislead Arkansas consumers to believe that they must purchase the promoter's product, or otherwise pay to the promoter sums of money in order to be eligible to receive the prize, or that the likelihood that the prize to be awarded will be increased, or that the consumer's application for the prize will receive special handling if the consumer purchases the promoter's product. These sweepstakes, contests, and prize promoters prey particularly upon elderly Arkansas consumers.
>
> (b) It is the intent of the General Assembly through the enactment of this chapter to require that Arkansas consumers be provided with all relevant information necessary to make an informed decision concerning sweepstakes, contests, and prize promotions. It is also the intent of the General Assembly to prohibit misleading and deceptive prize promotions. This chapter shall be construed liberally in order to achieve this purpose.

The intent of the legislation is clear – in order to avoid misled consumers, all relevant information must be published **prior** to the promotion. Nowhere in the statute or the intent of its drafters does it state that relevant information can be provided at a later date. But the lower courts have created a new "after the fact" notice provision as long as it was "reasonable". However, if the legislation wanted a

reasonable notice standard, they would have written it as such. Instead, the plain meaning of the statute, which is clear and unambiguous, mandates relevant information shall be provided prior to the promotion – there is no discretion.

- Thus, the lower courts clearly misinterpreted and rewrote the statute by imposing a "reasonable notice" on promotion restrictions which is contrary to the unambiguous statute and legislative intent. By creating a new notice standard, the lower courts have violated the Petitioner's due process rights and constitutional rights under the Fourteenth Amendment since they placed a heavier burden upon the Petitioner to prove invalid notice.

CONCLUSION

The Eighth Circuit and the Eastern District Court of Arkansas have placed a high burden of proof upon the Petitioner to overcome a summary judgment motion. The Court should grant *certiorari* to review this important matter, clarify the parties burden, order a proper remedy for the Petitioner, reverse the Eighth Circuit's and District Court's opinions, and order that the Petitioner had a constitutional right to a jury trial since there was proven misinterpretation of the notice requirement under applicable statutes to prove her breach of contract claim and if McDonald had complied with discovery orders, the Plaintiff would have submitted additional information to substantiate her claims.

Respectfully Submitted,

Marina Tramontozzi
Counsel of Record
815 15th Street, N.W.
Suite 601
Washington, D.C. 20005
(202) 393-1070

No. 99-3931

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Vernicesa F. Barnes,
Appellant,

v.

McDonald's Corp.,
Appellee.

Nancy Ball, doing business as McDonald's NDK Corporation,
Defendant.

June 14, 2000, Submitted

August 9, 2000, Filed

JUDGES:
Before BOWMAN, FLOYD R. GIBSON,[1] and MORRIS SHEPPARD ARNOLD, Circuit Judges.

OPINION:

PER CURIAM.

Vernicesa Barnes appeals from the decision of the District Court[2] granting summary judgment to McDonald's Corporation on her claims for breach of contract and violation of the Arkansas Prize Promotion Act. Barnes's suit was brought when McDonald's refused to redeem a mis-cut prize stamp from a promotional game being conducted at participating McDonald's restaurants in 1998. Barnes

received the stamp when she purchased hash browns from a McDonald's restaurant in Benton, Arkansas. Barnes contends that there remain in her case genuine issues of material fact, some of which she has been unable to develop because McDonald's failed to comply with all of her discovery requests, and so summary judgment was improper under Federal Rule of Civil Procedure 56.

We have reviewed the record and agree with the District Court that, based on facts in the record that are not disputed, McDonald's is entitled to judgment as a matter of law. Contrary to Barnes's assertion, McDonald's properly notified contestants of the rules of its game in accordance with the terms of the Arkansas Prize Promotion Act, so there was no violation of the Act. Further, those rules provided the terms of the contract between Barnes and McDonald's. Barnes did not comply with the rules of the game (that is, the terms of the contract) because she did not submit a valid winning ticket; therefore, she has no claim for breach of contract. To the extent that Barnes suggests she could identify genuine issues of material fact had McDonald's responded adequately to her discovery requests, she is not entitled to relief in this Court. As the District Court noted, she failed to invoke the powers of that court to compel the discovery she thought she needed, even though she had ample time and opportunity to do so.

The judgment of the District Court is affirmed.

n1 Complications from an automobile accident have prevented Judge Gibson from reviewing this opinion prior to its being filed.

n2 The Honorable William R. Wilson, United States District Judge for the Eastern District of Arkansas.

LR: 98-CV-547

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

VERNICESA BARNES, PLAINTIFF

v.

MCDONALD'S CORPORATION, DEFENDANT

72 F. Supp. 2d 1038; 1999 U.S. Dist. LEXIS 20530

September 17, 1999, Decided

COUNSEL:

For VERNICESA F BARNES, plaintiff: Willard Proctor, Jr., Proctor & Associates, Little Rock, AR.

For MCDONALD'S CORPORATION, NANCY BALL, defendants: W. Lee Tucker, Boswell, Tucker & Brewster, Bryant, AR.

For MCDONALD'S CORPORATION, NANCY BALL, defendants: David S. Foster, Kevin C. May, Latham & Watkins, Chicago, IL.

OPINION:

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pending is defendant's Motion for Summary Judgment. (Doc. No. 35). Plaintiff has responded to the Motion. (Doc. No. 37). For the reasons set forth below, the Motion for Summary Judgment is Granted.

Background

Beginning March 26, 1998. McDonald's Corporation began promoting sales of their food items by sponsorship of a game known as the "1998 McDonald's Monopoly Game." The Official Rules established two types of game-stamps: "Collect to Win" stamps and "Instant Win" stamps. The "Collect to Win" stamps indicate on their face that other game-stamps identified on the stamp have to be collected in order to win the prize identified on the stamp. "Instant Win" stamps do not indicate that other game-stamps must be collected in order to win the prize identified on the stamp. Thus, there are two ways to become a potential winner: (1) collect the entire series of official "Collect to win" stamps or (2) obtain a single official "Instant Win" stamp.

The Official Rules of the promotion were openly posted in all participating McDonald's. Participants in the game where given notice of the existence and location of these Official Rules by Game Boards supplied by McDonald's and by the Redemption Forms that aspiring winners of the major prizes had to sign and mail to the McDonald's Redemption Center for confirmation.

The Official Rules state in part:

> All game materials are subject to verification at a participating McDonald's or the Redemption Center, whichever is applicable. Game materials are null and void and will be rejected if not obtained through authorized,

> legitimate channels, or if they are mutilated, or tampered with in any way (except for the signed initials of the potential winner), or if they contain printing, typographical mechanical or other errors. All decisions of McDonald's and the Redemption Center are final binding and conclusive in all matters. (Emphasis added)

FACTS

On April 3, 1998, the plaintiff, Vernicesa Barnes, went into a McDonald's restaurant to order hash browns. In accordance with the game's Official Rules, a game stamp was affixed to the container holding the plaintiff's hash browns. Plaintiff removed and examined the game piece and found that it stated: "$ 200,000 Dream Home Cash--Stamp 818--Need Stamps 818, 819, & 820 to Win--Instant Winner!"

Later that day, plaintiff returned to the McDonald's restaurant and filled out the necessary forms to begin the redemption process. In accordance with the Official Rules, the game stamp and a signed redemption form were then mailed to the McDonald's Redemption Center. It was there that the stamp's authenticity was to be determined under the Official Rules which state: "You are not a winner of any prize until your official game stamp(s) has been verified at the Redemption Center or a participating McDonald's, whichever is applicable." Before mailing the redemption form, Plaintiff initialed a specified box on the form by which she agreed that she had "read, understood, complied with and...[accepted] all the Official Rules of the Monopoly Game at McDonalds." (McDonald's Redemption Form)

On May 1, 1998, plaintiff received a letter from the Redemption Center telling her that the game-stamp would not be honored. The notification stated that the game-stamp was a miscut "Collect to Win" game stamp and was therefore null and void under the Official Rules.

Plaintiff filed suit on March 3, 1998 asserting three claims: negligence, deceptive trade practices, and breach of contract. That complaint has since been amended to include a Prize Promotion Act § 4-102-106 cause of action. This Court has dismissed the allegations of negligence and deceptive trade practices but withheld its ruling on the breach of contract claim until adequate discovery was provided by the defendants. The requested discovery has been provided and defendant now renews their Summary Judgment motion on the plaintiff's breach of contract claim.

SUMMARY JUDGMENT

Summary Judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided solely on legal grounds. Holloway v. Lockhart, 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56. Based on this standard, the non-moving party is entitled to have the facts viewed in the light most favorable to her and all reasonable inferences drawn in her favor Reed v. ULS Corp., 178 F.3d 988, 1999 WL 336284, at *1 (8th Cir. 1999). The Court finds the defendant has a properly supported motion and that the burden has shifted to the plaintiffs to demonstrate the existence of a genuine dispute. City of Mt. Pleasant v. Associated Elec. Coop., 838 F.2d 268, 273-74(8th Cir. 1988). In this situation, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Plaintiff's first argument is that discovery answers provided by the defendant have been inadequate and therefore Summary Judgment is improper. Summary Judgment is only proper after the non-moving party has had adequate time to engage in discovery. Stanback v. Best Diversified Products, Inc., 180 F.3d 903, 1999 WL 285481 at *6 (8th Cir. 1999), Nat'l Bank of Commerce, of El Dorado,

Ark. v. Dow Chem. Co., 165 F.3d 602, 606 (8th Cir. 1999). Here, however, the Court finds that adequate time has [**6] been granted and that discovery has been sufficient on the breach of contract issue.

After the hearing of July 14th, 1999, the Court ordered the defendants to answer six specific interrogatories which the plaintiff claimed were important to their Summary Judgment response. Those interrogatories have been answered, and the parties have had ample time to either receive discovery or force discovery through the Court. There is no question that discovery has been adequate to prove whether a contract existed, and if so, whether it was breached.

As to whether a contract was breached, plaintiff's argument is summarized in four propositions: (1) that the Official Rules of the McDonald's promotion are null and void in that they conflict with the language of the Arkansas Prize Promotion Act (A.C.A. § 4-102-106); (2) that under that statute's language, the terms of the contract should be found solely on the game stamp itself; (3) there were no restrictions on the game-stamp itself, no restrictions apply, and the possession of the stamp itself contractually bound the defendant; and finally, (4) the defendant did not pay and therefore breached the $ 200,000 contract.

Plaintiff's position on the breach of contract issue is so inter-related to the Prize Promotion claim, that in deciding the Summary Judgment motion on the breach of contract issue, the Court must, by necessity, address the Prize Promotion Act Summary Judgment motion as well.

Plaintiff has not yet responded to defendants motion for Summary Judgment on the Prize Promotion cause of action, but plaintiff has argued both during the telephone conference and by brief how and why this statute defines the contractual relationship between the parties. The Court, having read all of plaintiff's offerings on this issue to date and the statute

itself, is adequately prepared to address the implications of this statute on the breach of contract claim.

THE PRIZE PROMOTION ACT HAS NOT BEEN VIOLATED

A.C.A. § 4-102-106 was designed to prevent misleading and deceptive prize promotions. The statute requires that Arkansas consumers be provided with all relevant information necessary to make informed decisions concerning sweepstakes, contests, and prize promotions. Sponsors of prize promotions like the McDonald's Monopoly are required to disclose various items of relevant information. Of primary relevance to this discussion [**8] is the statute's requirement that the consumer get notice of restrictions that might apply and a description of those restrictions. A.C.A. § 4-102-106 (b)(5).

Plaintiff argues that the game-stamp itself was the only "prize notice" given and that it contained no restrictions or notice of restrictions. Furthermore, plaintiff contends that defendants violated the language of the statute by not having these restrictions on the face of the game-stamp and that this violation of statutory language voids the contract provisions found in the defendant's Official Rules.

The Court finds this argument unpersuasive on three levels. First, the game stamp itself was not the only "prize notice" given to the plaintiff. Plaintiff admits that prior to her receiving the mis-cut game stamp she had in her possession a McDonald's Monopoly Game Board. That board specifically states: (1) "YOU MUST READ AND COMPLY WITH THE COMPLETE OFFICIAL RULES POSTED AT PARTICIPATING McDONALD'S RESTAURANTS" (printed in bright red, all caps, and bold face); (2) "IF YOU THINK YOU HAVE A WINNING GAME STAMP, READ THE OFFICIAL RULES FOR REDEMPTION INSTRUCTIONS" (printed in all caps and bold face); and (3)

"SEE OFFICIAL RULES FOR PRIZES, ODDS AND ALL OTHER DETAILS" (printed in all capital letters).

These Games Boards were widely dispersed to the public by an advertising circular promoting McDonald's Monopoly and were placed in a large number of Sunday newspapers. Additionally, throughout the running of the game, Game Boards were available at McDonald's stores to be picked up by anyone interested in playing. The Court finds plaintiff had possession of the Game Board and had notice of a very relevant game restriction -- that the game had rules to be followed.

Second, the Court finds it relevant that the Official Rules were openly posted in the restaurant which plaintiff admits to eating at frequently. A.C.A. § 4-102-106(a) reads:

> No sponsor shall offer a prize, nor shall a sponsor use any solicitation, whether written or oral, and however communicated, that offers a prize, unless the person to whom such offer is made has first received a written prize notice containing the information required in subsections (b) and (c) of this section. (Emphasis added).

All of the information required under subsections (b) and (c) is found in the Official Rules which were openly posted within the McDonalds. The Court finds that these posted rules serve as a fundament part of a written prize notice, especially in light of the references made to these rules on the Game Board and the Redemption Form. Furthermore, placing the rules and restrictions openly in the exact building where the prize stamps are being given away puts all participants on notice that there are rules, which are restrictions.

Third, the defendant signed a Redemption Form which put the plaintiff on notice by advising: (1) "You are not a

winner until your game materials are verified at the Redemption Center, and until you have complied with the Official Rules" (all in bold-face type), and (2) "Please read the Official Rules posted at participating McDonald's restaurants before sending your required game materials to the Redemption Center." Moreover, the plaintiff filled out the redemption form and initialed a portion of the envelope that read: "I hereby declare that I have read, understood, complied with and do accept all of the Official Rules of the Monopoly Game at McDonald's."

The Court finds that McDonald's substantially complied with the language of the Arkansas Prize Promotion Act and that the game-stamp was not the only prize notice given. With that in mind, the Court concludes that the Official Rules of the McDonald's Monopoly game serve as the controlling contract.

DEFENDANT HAS BREACHED NO CONTRACT

With its Official Rules, defendant put forth an offer of a unilateral contract, which could only be accepted by performance of the contract's terms. In order to win the major prizes offered by the defendant, the mere possession of a game prize stamp was not enough to perform. To win these more substantial prizes, the plaintiff had to complete three steps as described in the game's Official Rules. Only upon the completion of these three steps of performance would McDonald's become legally obligated to tender the prize.

The first step required by the game's Official Rules was that the plaintiff actually have possession of a valid, winning ticket. Second, plaintiff was required to sign a redemption form acknowledging that she understood and accepted the Official Rules. Third, plaintiff had to mail the redemption form and the game stamp to the McDonald's redemption center for a validation procedure.

Plaintiff did not possess a valid, winning ticket, and therefore, the plaintiff could not comply with the rules and conditions of the promotion. Waible v. McDonald's Corp., 935 F.2d 924, 926 (8th Cir. 1991). This logic follows the general rule in most jurisdictions that a contractual relationship exists between the promoter of a contest and the participant of the contest only if the participant complies with the terms of the contest rules. Johnson v. BP Oil Co., 602 So. 2d 885, 888 (1992); See generally 64 ALR 4th 1021, 1045-52 (1988).

The McDonald Redemption Committee made a decision that game-stamp contained "printing, typographical, mechanical or other errors" and was therefore "null and void" under the terms of the Official Rules which the plaintiff agreed to. This Court should uphold the decision of the Redemption Committee as long as it is not arbitrary, capricious, or made in bad faith. See Johnson, 602 So. 2d at 888 ("We adopt the rule that running a promotional contest is in the nature of an offer and that an enforceable contract is formed when the party accepts that offer and provides consideration by entering the contest and complying with all the terms of the offer. We further adopt the rule that unless there was fraud, irregularity, intentional misconduct, gross mistake, or lack of good faith involved in the contest, the judging organization's decision is binding.") Plaintiff does not argue the committee acted arbitrarily, capriciously, or in bad faith, and the game-stamp submitted by the plaintiff is obviously mis-cut to all but those who will not see. Therefore, it was impossible for plaintiff to perform the unilateral contract and no breach can be established.

This case is closely analogous to the Waible v. McDonald's Corporation, 935 F.2d 924 (8th Cir. 1991). In that case, the plaintiff submitted a game token to the McDonald's redemption center which was from an entirely different promotion being conducted by a grocery store. That

plaintiff too argued that mere possession was acceptance of McDonald's offer. The Eighth Circuit stated:

> The token received by Waible was an offer for a unilateral contract that could only be accepted by performing all the terms and conditions of the promotion. She did not comply with all the terms and conditions of the promotion because the token she submitted was not an official token. Thus, the offer was not properly accepted. Id at 926.

In this case, Ms. Barnes was equally unable to accept the unilateral contract without having a valid, winning game stamp. The Official Rules of the contest state:

> All game materials are subject to verification at a participating McDonald's or the Redemption Center, whichever is applicable. Game materials are null and void and will be rejected if not obtained through authorized, legitimate channels, or if they are mutilated, or tampered with in any way (except for the signed initials of the potential winner), or if they contain printing, typographical mechanical or other errors. All decisions of McDonald's and the Redemption Center are final binding and conclusive in all matters. (Emphasis added)

The Redemption's Committee's decision that the stamp was null and void simply reflects the language of the Official Rules.

Conclusion

A.C.A. § 4-102-106 does not define the contractual relationship between the parties; therefore, the Official Rules serve as the controlling contract. Without possession of a valid game-stamp, the plaintiff was unable to perform the unilateral contract. This lack of compliance results in no contract, and no duty to perform by the defendants, i.e., without a contract there can be no breach. Summary Judgment is GRANTED as to both the breach of contract claim and the Prize Promotion Act violation.

IT IS SO ORDERED this 17th day of September 1999.

UNITED STATES DISTRICT JUDGE